

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
Furrs Supermarkets, Inc.
Debtor.

No. 7-01-10779-SA

Yvette Gonzales, Trustee,
Plaintiff,
v.

Adv. No. 02-1107 S

American Promotional Events,
Inc. Midwest,
Defendant

**MEMORANDUM OPINION ON MOTION
FOR NEW TRIAL OR TO AMEND JUDGMENT**

This matter came before the Court for trial on the merits. On March 1, 2004, the Court entered its Memorandum in Support of Judgment (doc 74) which constituted the Court's findings of fact and conclusions of law, and a Judgment (doc 75) awarding Plaintiff \$91,390.41 together with costs and postjudgment interest. American Promotional Events, Inc. Midwest ("American") timely filed a motion under Fed.R.Civ.P. 59(e) to reconsider the Court's judgment, or for a new trial (doc 76), to which Plaintiff Trustee responded (doc 77), and American replied (doc 78).

Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law.

Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). (Citation omitted.) The Court finds that the Motion to amend judgment is well taken in part and will be granted in part. The Court also finds that a new trial is warranted on the issue of credits for returned goods. The Court will address each of American's arguments in turn.

1. The Court erred in exceeding the demands and theories stated in the complaint.

American's objection is that in the Memorandum (doc 74) the Court increased the Trustee's recovery by including certain credit memos as preferential transfers. The Trustee argues that the inclusion was based on competent evidence and this adjustment was within the Court's discretion. American argues that the credit memo issue was not previously raised, was not tried, and it was denied the opportunity to defend or offer evidence or legal authority in support of its position.

Before trial the parties filed a Stipulation of Facts (doc 65) that stated "7. The amount of the 'net' preference claim is not more than \$89,722.11." The Court will deem this supercedes any prior amounts listed in the complaint or amended complaint. Upon reflection, the Court finds that it should have limited the award to an amount that did not exceed that figure.

First, as a general rule, stipulations are binding on the parties absent special circumstances. Vallejos v. C.E. Glass Co., 583 F.2d 507, 510 (10th Cir. 1978). No special circumstances were shown by the Plaintiff "such as a change of conditions, justifying relief from the stipulation to prevent manifest injustice." Id. at 511. See also J.C. Sims, Inc. v. Wyrick, 743 F.2d 607, 610 (8th Cir. 1984):

We have consistently held that stipulations of fact fairly entered into are controlling and conclusive, and that relief from such stipulations will be granted only under exceptional circumstances. ... We see no suggestion of manifest injustice, here, and we cannot accept the suggestion that a stipulation may be disregarded whenever substantial evidence contradicting it is introduced. Indeed, if substantial evidence contrary to a stipulation were all that was required to disregard it, the purpose of stipulations would be severely undercut. The usual purpose of a stipulation is to reduce the proof needed at trial and to narrow the focus of the parties' efforts. If a party could be relieved of a stipulation on a mere showing of substantial contrary evidence, litigants could not rely on stipulations of fact and would have to be fully prepared to put on their proof.

(Citations omitted.) Upon review, the Court finds that it should have enforced this stipulation by awarding no more than the maximum amount.

Second, application of Fed.R.Civ.P. 15(b) suggests that the judgment should be amended. That rule provides:

Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated

in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Plaintiff argues that the issues were raised by the pleadings, so that Rule 15(b) does not apply. American disputes this. However, the Court does not need to decide that dispute, because whether the issue was raised or not, the stipulation limited recovery to a sum certain. The issue of more than that sum was a new issue, and American had no reason to believe at trial it would be. Plaintiff did not ask to amend the pleadings to ask for this increased amount, and American was not given the opportunity to object. See Dunn v. Ewell (In re Santa Fe Downs, Inc.), 611 F.2d 815, 817 (10th Cir. 1980)(Rule 15(b) mandates liberal amendments to conform pleadings to the evidence, but there is no provision for an automatic amendment if proper objections are made to the admission of evidence). Furthermore, there can be no inference that American waived its

rights or consented to try the issue, because, under the stipulation, it was not an issue. Therefore, the Court finds it would be fundamentally unfair to American to let this portion of the judgment stand.

American's Motion goes beyond this, however. It argues that the stipulated amount was only a cap, and that it was only on notice to defend against the \$82,031.71 listed on Exhibit A of the Complaint plus "potential additional amounts" defined as any other check cashed by American during the preference period; the Trustee never asked for the value of returned products. The Trustee counters by claiming the original complaint was broad enough to cover the returned products.

Upon reflection, the Court finds that it should award a new trial limited to the issues of 1) whether the Trustee's Complaint was sufficiently broad to include product returns, 2) whether this issue was in fact tried, 3) whether the Trustee can amend the Complaint at this time, and 4) any facts or defenses related to the preferential impact of product returns.

2. Defendant failed to provide sufficient evidence of the range of payment terms and practices.

American argues that the Court misapplied the law in its ruling on its ordinary course of business defense. The argument focuses on the Court's statement that, in connection with the "ordinary business terms" language of § 547(c)(2)(C),

"American had the burden of coming forward with a prima facie case to show what the terms were for the industry as a whole." (Memorandum, doc 74, page 16). American claims that this is not an accurate statement of the law and that it placed too high a burden on it. Rather, American claims that it needed only to show that the payments were within the range of (some) business practices in the industry, not that they were consistent with all business practices in the industry. See Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.), 18 F.3d 217, 226 (3rd Cir. 1994).¹

American presents the quoted statement out of context. On pages 13 to 15, the Court reviewed the evidence and found, essentially, that this case presents one of the unique situations not often found in the preference case law where the defendant creditor itself constitutes practically the entire

¹ "In sum, we read subsection C as establishing a requirement that a creditor prove that the debtor made its pre-petition preferential transfers in harmony with the range of terms prevailing as some relevant industry's norms. That is, subsection C allows the creditor considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be 'unusual' remain within subsection C's protection." Read carefully, however, even this citation does not say that proof of only a part of the industry suffices; the creditor must still establish what the (presumably entire) relevant industry is and what its practices are.

industry. "In effect, therefore, American's sales define the market that American is in; those sales are the market." Page 13. Taking the quoted statement in this light, it is clear that the Court was stating that American needed to present the range of American's business terms with all or at least a large portion of its customers, which would establish what the industry range was. See In re Molded Acoustical Products, Inc., 18 F.3d at 227 ("Just as one swallow does not a spring make, one firm does not an industry make (at least not ordinarily; an exceptionally large firm may be an industry unto itself)."^{Footnote omitted.}); see also Advo-System, Inc. v. Maxway Corp. (In re Maxway Corp.), 37 F.3d 1044, 1049 (4th Cir. 1994) (creditor's operations constituted virtually the entire market). Establishing what the industry range was is exactly what the Court found that American did not do. "By coming forward with evidence of what clearly appears to be only a small portion of that industry, American left a significant doubt in the Court's mind about what is the industry-wide practice of payment for goods received." Page 16.

Citing cases from other circuits, American next argues that it needed to show only that payments were within the "range of business practices" in the industry. Even if the decisions from those circuits were binding on this Court, the

Court finds that the evidence presented at trial did not establish this range. American showed a "small portion." See Page 16.

And in fact, the Court was, and still is, troubled by that showing. There was no evidence at trial on how these customers were chosen, in what ways they were similar to Furrs (or how they were different), whether they were representative of the entire "broad range", or whether these were "healthy" customers. In fact, the Court stated, at pages 16-17, that the evidence "strongly suggests that the accounts presented are a small percentage of the total industry. Nor did American present credible evidence ... that the apparently small sample ... was representative of the rest of the industry." Taking American's theory to its logical conclusion, it would be acceptable for a creditor to pick only those customer relationships that favored its ordinary course defense and then claim that these few relationships constituted the entire relevant spectrum. This cannot be the law, at least in the Tenth Circuit.

American argues that the evidence of the payment practices of over two dozen of its customers that were similar to Furrs is a sufficient showing of the range of terms, citing Columbia Gas of Ohio, Inc. v. Luper (In re Carled, Inc.), 91

F.3d 811 (6th Cir. 1996) for the proposition that it need only show that the practices in question were not an idiosyncratic departure from industry practices, and for that it needed only to show the business practices for a relatively small portion of the industry. In Carled, the creditor natural gas utility company offered evidence about its own billing practices, the billing practices of public utility companies with which it was affiliated in Kentucky, Maryland, Pennsylvania, and Virginia, and the billing practices of a gas utility operating in Ohio and serving approximately one million customers, including approximately 70,000 commercial customers. Id. at 814. In short, the evidence about some of the gas utility companies in a relatively small area of the nation constituted data only about a relatively small portion of the national utility market for supplying natural gas to commercial customers. Nevertheless the Sixth Circuit ruled that this evidence was sufficient to meet the "ordinary business terms" test.²

² "Following the clear consensus among the courts of appeals that have interpreted section 547(c)(2)(C), we hold that 'ordinary business terms' means that the transaction was not so unusual as to render it an aberration in the relevant industry. Therefore, we reject the definition of 'ordinary business terms' adopted by the district court, which would require that the transactions at issue resemble a majority of the industry's transactions, and we also reject the definition adopted by the bankruptcy court requiring Columbia to establish the lateness as a pattern for a significant

(continued...)

To begin with, the Carled standard is not the law in the Tenth Circuit, which requires simply (albeit perhaps not easily) that the industry practices of a healthy debtor and a creditor be the standard. Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners), 12 F.3d 1549, 1553 (10th Cir. 1994), cert. denied 512 U.S. 1206 (1994) (defining "ordinary business terms" as "those used in 'normal financing relations': the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy."). This "healthy" debtor gloss is, admittedly, unique to the Tenth Circuit. Nevertheless, it is binding on this Court.

Even in the absence of Meridith Hoffman Partners, however, the Court would not be inclined to adopt the Carled standard. For example, if the creditor is not required to show what the entire (or at least most of the) range of practices is for the industry, how will a court know that the specified practices

²(...continued)
percentage of specific customers. Columbia's evidence showed that ten percent of its commercial customers made payments thirty days or more after the meter reading date and that twenty-four percent of East Ohio Gas's customers were at least thirty days past due on their accounts and that it was 'ordinary' for commercial customers to fall into that category. Accordingly, Columbia's evidence showed that it is not aberrational, unusual, or idiosyncratic for utility companies to accept late payment on their invoices as long as payment is received within the forty-one day billing cycle." Id. at 818.

are "ordinary"? If a creditor proves up less than, say, 50% of the practices, then does four-fifths of the 50% (that is, 40% of the industry) get treated as the industry standard? If that 40% suffices, what about 20%, or 10%; where is the line drawn? And if a court relies only on a 10% sample, what evidence would the court need to ensure that the 10% was not radically different from the remaining 90%, and would not that proof result in the creditor in effect having to prove up the practices of the entire industry? And randomly picking a percentage figure which is less than at least a substantial majority of the industry (the practices of such substantial majority by definition probably constitute "ordinary business terms") risks drawing a number out of the air, which is hardly a methodology that recommends itself. Compare BFP v. Resolution Trust Corporation, 511 U.S. 531, 536, 114 S.Ct. 1757, 1760-61 (1994) (overruling Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (1980), which held that any foreclosure sale that brought less than 70% of the fair market value could be set aside as a constructively fraudulent transfer). Compare also Union Bank v. Wolas, 502 U.S. 151, 156-57 and n. 11 (1991) (Discussing that Congress removed the arbitrary 45-day limitation from § 547(c) in 1984.)

In summary, even if "ordinary" is defined merely as "not unusual" or "not idiosyncratic", the question still arises as to what percentage of the industry are the practices in question ordinary. What would be ordinary for only one merchant in an industry comprised of a million merchants would clearly not be "ordinary" for purposes of the statute; what would be ordinary for the remaining 999,999 merchants clearly would be ordinary for purposes of the statute. Thus, the standard does come down to numbers, and the only way to be sure that a practice is ordinary is to know that at least a majority of the industry so regards it.

Carled also relied on the difficulty of a defendant gathering the needed information about its competitors' practices as a reason not to require evidence of a large part of the industry. Id. at 819; accord, In re Molded Acoustical Products, Inc., 18 F.3d at 224. Without gainsaying the difficulties involved, such purported difficulties cannot be the basis for altering the statute. If reality makes it hard for a defendant to meet the demands of the statute, the remedy lies with Congress rather than with the courts to amend the statute.³ See Wolas, 502 U.S. at 157-58 and nn. 10 & 11.

³ The issue of difficulty of proof should not of course be relevant in this case, in which American defines the market.
(continued...)

American also argues that the fact it did not present more evidence should not be construed against it. The Court disagrees.

[T]he [Adverse Inference Rule] provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said [2 J. Wigmore, Evidence § 285 (3d ed. 1940)]:

The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted.

Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board, 459 F.2d 1329, 1336 (D.C. Cir. 1972). Furthermore, this rule creates a rebuttable presumption and application of a presumption is mandatory unless reasons affirmatively appear for not applying it. Id. at 1346. Therefore, the Court's suspicion (Memorandum, page 17) that full presentation of

³(...continued)

But the Sixth Circuit's reliance on that factor makes the Carled case even less appropriate in the context of this case.

evidence would have supported the Trustee's position is fully justified both as a matter of common sense and under the law. This is particularly the case when the customers selected were all clustered in the midwest and southeast, and not in the southwest.

American claims that the chaotic environment at Furrs described on pages 17 and 18 of the Memorandum is not a relevant factor to the objective test of ordinary business terms. The Court disagrees. Under the "healthy" debtor standard of Meridith Hoffman Partners, American needed to show what the range of practices were between healthy debtors and their creditors - the industry practices -- and then show that what was going on between Furrs and American fell within the range of the industry practices. It was therefore relevant to consider what was going on at Furrs during this time, whether American knew of what was going on or not. See page 18, n.11. So the testimony was relevant.⁴

3. Subsequent value.

The Court made an error in the Memorandum and Judgment on this point which should be corrected. The law regarding the subsequent value defense is set out in Gonzales v. DPI Food

⁴ In any event, by this point in the Memorandum the Court had already ruled "In other words, American failed to make a prima facie case for its § 547(c)(2)(C) defense." (Page 17.)

Products Co. (In re Furrs Supermarkets, Inc.), 296 B.R. 33, 45 (Bankr. D. N.M. 2003) ("For the purposes of section 547(c), a preferential transfer occurs on the date the check is delivered. And, the creditor extends new value when goods are shipped.") (Citations omitted.)

On page 21 of the Memorandum the Court stated "The four deliveries of product valued at \$9,358.70 delivered on December 27 and 29 and on January 3 and 4, cannot be credited against the Furrs payment of \$83,977.99 on January 4 because they were not 'subsequent'." In fact, the check was dated December 27 (see Stipulation ¶ 2, doc 65) but honored by the bank on January 4 (see Trial Exhibit L.) From a review of the record the exact date the check was received is debatable, but the overall record suggests it was received on December 29th and the Court will so find. Therefore, the Court will modify its Memorandum by stating that the December 29, January 3, and January 4 payments were "subsequent" and can be fully applied as a defense, as American has specifically requested. Doc 76, at 7.

4. Contemporaneous Exchange of Value.

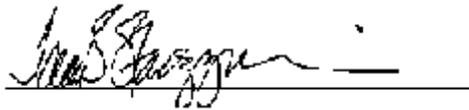
The Court has reviewed American's arguments on the § 547(c)(1) defense and the record in light of American's argument that the payment advices on the check stubs provided

sufficient evidence of a shared intent that a portion of the payments was meant for contemporaneous deliveries. Roger Kite and Ken Delfield for American, and Judy Baker for the Trustee, testified concerning what the quid pro quo may have been for American to ship to Furrs in December 2000. As part of the retrial of the case, the Court will reexamine the evidence on the issue of the parties' mutual intent to have the payments of the specified invoices serve as a substantially contemporaneous exchange for the final deliveries. As part of that reexamination, the Court will require the parties to submit exhibits (preferably a joint exhibit) showing which shipments American claims should be credited as subsequent new value pursuant to § 547(c)(4) and which should be credited as contemporaneous exchanges for new value pursuant to § 547(c)(1). To the extent that the new product was credited to American pursuant to the subsequent new value rule of (c)(4), it cannot also be credited under (c)(1) - or at least cannot be counted twice.

CONCLUSION

For these reasons, the Court finds that the judgment should be amended to give credit for the subsequent value extended on December 29, January 3 and January 4. The Court will also reexamine the issues regarding product returns, and

whether and to what extent American proved its defense of contemporaneous exchange of value, and as part of that reexamination will require the parties to submit an exhibit or exhibits to show what overlap if any there is for product deliveries that were subsequent new value versus contemporaneous exchange of value. The Court finds the balance of American's arguments not well taken. The Court will schedule a pretrial conference to set further proceedings.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on December 23, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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